Federal Financing for Australia LNG Projects Does Not Trigger ESA

Jeremy Brown September 23, 2014

Already the world's third-largest exporter of liquefied natural gas (LNG), Australia is expected to overtake Qatar as the leader by 2016, as its natural gas boom has driven production and led to the construction of new export infrastructure at a much faster clip than in other emerging LNG powerhouses like the United States and Canada.

In 2012, the Export-Import Bank of the United States (Ex-Im Bank) announced that it would provide almost $5 billion in financing for two LNG projects in Australia. The Ex-Im Bank, which has made news recently because it will have to wind down unless Congress votes by the end of this month to reauthorize it, is an independent federal agency that finances international projects intended to create American jobs.

In announcing the financing for the Australian projects, the Ex-Im Bank issued a press release quoting its chairman as explaining: "This natural gas project will support thousands of U.S. jobs, and demonstrates one of the many exporting opportunities throughout Australia … American-made products offer a quality and consistency that is respected around the world, and that's why businesses want 'Made in the USA' labels on their shelves."

If the Ex-Im Bank or another federal agency was providing financing, permitting, or some other sort of regulatory support or approval for large LNG facilities in the United States, it would have to follow the procedural requirements of environmental laws such as the Endangered Species Act (ESA). For facilities in other countries, those laws impose fewer obligations.

For the Australian financing, the Ex-Im Bank considered itself outside the scope of the ESA. The Center for Biological Diversity (CBD) disagreed, however, and filed a lawsuit in the Northern District of California. Recently, the court issued its opinion, granting the Ex-Im Bank's motion to dismiss.

The ESA empowers the Fish and Wildlife Service (FWS) to take certain actions to protect terrestrial species and the National Marine Fisheries Service (NMFS) to do the same for marine species. Section 7(a)(2) requires a federal agency to consult with the FWS or NMFS, as applicable, to "insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an 'agency action') is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species."

CBD argued that the decision to finance the Australian LNG facilities constituted an "agency action" and that the Ex-Im Bank had violated Section 7(a)(2) by failing to consult the FWS and NMFS. The Ex-Im Bank countered that an action taken in another country is not an "agency action" for the purposes of the Section 7(a)(2).

Section 7(a)(2) does not specify its geographical jurisdiction. In joint implementing regulations, the FWS and NMFS have defined an action to mean "all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies in the United States or upon the high seas." An earlier version of that regulation had encompassed actions taken in foreign countries but was replaced by the current version in 1986. The preamble to the current version explained that the excluding foreign countries from the reach of the ESA was appropriate "because of the apparent domestic orientation of the consultation and exemption processes resulting from the Amendments, and because of the potential for interference with the sovereignty of foreign nations."

CBD argued that the Ex-Im Bank's financing would amount to an action on the high seas because it would support harbor improvements that would in turn facilitate international LNG tanker traffic. The court rejected this argument: "The FAC does not allege facts plausibly suggesting that the transportation of LNG is part of the Projects funded by Ex-Im Bank. To the contrary, the allegations in the FAC demonstrate that transportation of LNG will occur after the Projects are completed."

As a fallback, CBD contended that any funding action made by the Ex-Im Bank in the United States – regardless of where in the world that funding would flow – would trigger ESA Section 7(a)(2) consultation requirements. The court found that such a reading was not supported by any legal authorities and would contravene the intention behind the 1986 revision to the ESA regulations.

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